

Memorandum

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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

TO : Bryant VanBrakle

DATE: January 15, 2004

FROM : Commissioner  Joseph E. Bremran

SUBJECT : Summary of Oral Presentation of C. H. Robinson Worldwide, Inc. re
P3-03, P5-03, P7-03, P8-03, and P9-03

This summary of an oral presentation, which took place on January 13, 2004 at 11:00 AM at the Commission's offices at 800 North Capitol Street, NW, Washington, DC, is being submitted to the Secretary of the FMC for submission into the record of the above proceedings. Present for the Commission were Commissioner Joseph E. Bremran and Steven Najarian, Counsel to Commissioner Bremran. Present for the presenters were: Joseph J. Mulvehill, Vice President International, C. H. Robinson Worldwide, Inc.; Carlos Rodriguez of Rodriguez, O'Donnell, Ross, Fuerst, Gonzalez & Williams, P.C.; and Jeffrey Scovill, Director of International Development, C. H. Robinson Worldwide, Inc. The presenters made the following points:

C. H. Robinson Worldwide, Inc. is a publicly traded company. It began as a produce business. In the 1980s the company expanded into transportation. C. H. Robinson provides many services, not just ocean transportation. Services include warehousing, distribution, ocean freight, intermodal, and less-than-truckload shipments. Companies often lack technology and infrastructure in these areas. C. H. Robinson offers customized solutions for customers.

C. H. Robinson currently has 15,000 customers. Its customers are becoming more global in scope. AOL is a customer and ships CDs globally. When AOL needed to source its products in China, C. H. Robinson moved with AOL. AOL relies on C. H. Robinson for logistics. AOL is concerned with confidentiality. AOL competes with Microsoft.

Currently the ocean component of a shipment must be public because of the tariff publication requirement, AOL does not want tariffs. AOL wants a confidential contract. Many other customers want the same thing. In the last seven years, C. H. Robinson has signed numerous confidentiality agreements, but it is prevented from doing so for ocean freight.

C. H. Robinson can decide which carrier to use. Shippers do not want to deal directly with ocean common carriers. Shippers leave that to C. H. Robinson.

The marketplace has changed since OSRA. For example, there are more logistics companies that offer a multitude of services. When the issue of service contracting was taken up in 1998, business was different. What NVOs would become was not so clear at that time. Since OSRA, there has been consolidation, and UPS and FedEx have grown. The relocation of manufacturing to offshore locations has changed the industry. The outsourcing of logistics is one result.

The old view of NVOs is no longer accurate. NVOs are not small companies with no assets, and they do bring something to the industry. NVOs provide many services in the ocean freight business, and the customers of NVOs want confidentiality for those services. Shippers, who are the customers of NVOs, want confidential contracts and more freedom to sign service contracts with NVOs. Shipper requirements are driving these petitions. Shippers seek an integrated approach to their problems.

The exemption process of section 16 can provide the remedies sought. The FMC has the authority to grant the petitions. Tariff publication is a requirement of the Act that can be lifted under the authority of section 16. Section 16 also gives the Commission the authority to impose conditions on NVOs that have been granted an exemption. The Commission could, for example, impose the same requirements on NVOs that are required of the vessel-operating common carriers. The Commission could require that the NVOs file service contracts confidentially with the FMC.

Congress dropped two of the four requirements for exemption.

The argument of the World Shipping Council is semantic. The WSC says, "Show me the harm." The exemption is discretionary. There is no requirement that a petitioner make a showing of harm.

C. H. Robinson is not being harmed in the sense of not being profitable. C. H. Robinson will not go out of business if the petitions are denied. Yet there are efficiencies to be obtained. C. H. Robinson can be better. By petitioning the Commission, C. H. Robinson is trying to make the FMC's regulations more relevant to the marketplace. There is a disconnect between the regulations and the marketplace.

The NVOs are saying, "Let us compete on the service we provide. Let's level the playing field."

The confidential service contracts used by OCCs since OSRA have been a success. This success shows that confidential service contracts are not anticompetitive or harmful to commerce. The experience of the OCCs under OSRA shows that service contracting has increased competition, and this exemption would be a continuation of that.

Ocean common carriers have their own logistics companies. OCC-owned NVOs were originally intended to feed the parent company. In some circumstances, the NVO of an OCC funnels cargo to the OCC. Yet the customer does not want that, and OCC-owned NVOs usually need to use a variety of OCCs. Therefore the OCC that owns a logistics company does not have a huge advantage. NVOs can compete with OCC-owned NVOs. NVOs sometimes work with their competitor NVOs to service a customer.

The Commission has received many letters from Congress in support of the petitions,

Commissioner **Brennan** stated that the pending petitions are an important issue and that the Commission would devote much time to them.

The presenters gave Commissioner **Brennan** a written statement of the oral presentation that had just been made. That statement is attached to this summary.

Attachment

BEFORE

**THE HONORABLE JOSEPH E. BRENNAN, COMMISSIONER
FEDERAL MARITIME COMMISSION**

ORAL COMMENTS OF:

**C.H. ROBINSON, INC.
FMC PETITION NO. P9-03
TUESDAY, JANUARY 13, 2004
11:00 AM**

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NOTES

**NOTES: ORAL PRESENTATION OF
C.H. ROBINSON, INC.
BEFORE THE FEDERAL MARITIME COMMISSION**

JANUARY 13, 2004

OVERVIEW OF CHRW'S PETITION

INTRODUCTION. (CARLOS RODRIGUEZ, ESQ.)

**THE COMMERCIAL ENVIRONMENT
THE LEGAL ENVIRONMENT
RESPONSE TO WORLD SHIPPING COUNCIL COMMENTS**

**THE COMMERCIAL ENVIRONMENT OF THE PETITION FOR EXEMPTION
(BY MR. MULVEHILL; MR. JEFF SCOMML)**

- **PRIMARY IMPETUS FOR PETITIONS: FREEDOM TO CONTRACT WITH SHIPPERS; DEMANDED BY SHIPPERS**
- **COMMERCIAL COMPETITIVE BENEFIT OF CONFIDENTIAL SERVICE CONTRACTING IS CLEAR**
- **COMMERCIAL CHANGES IN THE OTI COMMUNITY SINCE OSRA ARE RELEVANT IN TERMS OF TOTAL LOGISTICS PACKAGES, INCLUDING OCEAN TRANSPORTATION (TOWIT: THE OVERWHELMING CONGRESSIONAL RESPONSE ON POINT)**
 - 1. LOGISTICS DEVELOPMENT: MANY INTEGRATED SERVICES**
 - 2. CONSOLIDATION: LARGE COMPANIES ARE COMPETING IN THE OCEAN ARENA SUCH AS FEDEX, UPS, ETC.**
 - 3. OCEAN CARRIERS HAVE FORMED LOGISTICS ARMS**
- **THE EXEMPTION SHOULD BE GRANTED TO FINANCIALLY RESPONSIBLE NVOs LIKE C.H. ROBINSON**
- **SUMMARY OF C.H. ROBINSON, INC. OPERATIONS AND FINANCIAL STATUS**

1. THE OPERATIONS OF CHR

2. CHR'S FINANCIAL STATUS

- GROSS REVENUES
- DEBT PICTURE
- . IT FOCUSED

CONCLUSION.

THE BEST AND MOST EFFICIENT WAY TO CONDUCTING TRANSPORTATION SERVICE IS BY CONFIDENTIAL CONTRACTING WITH CUSTOMERS.

TARIFF SYSTEM IS ARCHAIC, EXPENSIVE, AND HAS NO COMMERCIAL BENEFIT TO ANY SEGMENT OF THE INDUSTRY, EXCEPT FOR SURCHARGES BY CARRIERS.

GUIDELINES FOR EXEMPTIONS: IN RESPONSE TO WORLD SHIPPING COUNCIL

LEGAL CONTEXT

**THE LEGAL CONTEXT OF THE PETITION
(BY CARLOS RODRIGUEZ, ESQ.)**

- FMC HAS CLEAR AUTHORITY TO ISSUE EXEMPTIONS PURSUANT TO SECTION 16.
- EXEMPTION AUTHORITY DOES NOT REQUIRE PARTICULAR OBJECTIVE. (WSC “NO HARM” ARGUMENT).
- A REASONABLE OBJECTIVE OF EXEMPTION WOULD BE TO ENHANCE COMPETITION; AND TO CREATE EFFICIENCIES TO SHIPPING PUBLIC (EX. “ONE STOP SHOPPING”)
- SECTION 16 EXEMPTION IS RELEVANT. PETITIONS ARE IN EFFECT REQUESTING ~~EXEMPTIONS~~ FROM TARIFF PUBLISHING REQUIREMENTS, WITH REASONABLE CONDITIONS WHICH THE FMC MAY IMPOSE ON THE CONFIDENTIAL CONTRACTING BETWEEN CHR AND ITS CUSTOMERS.
- TWO LEGAL PREREQUISITES ARE MET: A) COMPETITION IS ENHANCED; AND B) THERE IS A POSITIVE EFFECT ON COMMERCE
- RULEMAKING V. EXEMPTION
- WORLD SHIPPING COUNCIL COMMENTS ARE NOT PERTINENT

**RESPONSE TO:
WORLD SHIPPING COUNCIL COMMENTS**

**FEDERAL MARITIME COMMISSION
C.H. ROBINSON, INC.
JANUARY 13, 2004**

RESPONSE TO WORLD SHIPPING COUNCIL COMMENTS

1. “Enterprises acting as NVOCCs must publish tariffs because NVOCCs want to be considered and want to present themselves to the marketplace as “carriers,” notwithstanding the fact that they do not own or operate any ships that physically transport or carry cargo. In order to be accorded common carrier status, one must comply with the Shipping Act’s common carrier obligations.”

RESPONSE:

- a. There is no requirement in the Act that “common carriers” own or operate any vessels.
- b. The “asset” issue for carriers comes from Senator Breaux’s comments in the legislative history of the Slate-Gorton amendment where he pointed out that it is not right to allow NVOs to enter service contracts as carriers because: i) NVOs do not have the expenses; ii) do not have liability; and iii) do not have responsibility as carriers.

IN FACT PETITIONS/COMMENTS SHOW:

- . NVOS either have substantial assets, and corresponding expenses (See Petitions);
- NVOs like CHR have tremendous investment in IT solutions; and
- Liability and responsibility as carriers as can be readily seen in the legal systems with regard to cargo loss and damage claims;

- With NVO bonds, there is sometimes greater recourse by shippers against an NVO, than say a vessel operator going bankrupt as did Cho Yang.

2. The Council notes as a general observation that there is no evidence of **harm** under the current regulatory structure. NVOCC market growth has been substantial, and there is no data offered by the Petitioners showing that the regulatory structure embodied in the Shipping Act has impeded this growth.

RESPONSE:

- There is no legal requirement in seeking an Exemption to demonstrate that harm exists.
- The Petitions/Comments are talking about **creating efficiencies**, greater competition. For example: NIT League; Department of Justice. Harm is not the issue. It is about “**freedom to confidentially contract**”; creating “**efficiencies**”; greater “**competition**” among all players. Section 16 poses no particular objective of an Exemption; it only prohibits that an exemption not decrease competition, or that it results in detriment to commerce.

3. The WSC states: “The UPS petition nowhere states the specific requirement of this Act from which it seeks exemption. In fact, UPS does not seek to be freed from any requirement of the Act. Instead, it is **asking the Commission to grant it an affirmative privilege** that is not otherwise available to NVOCCs under the Act, i.e., the right of vessel operating common carriers to satisfy their rate publication/tiling obligations

through the filing of service contracts and the publication of required essential terms, That the petition does not seek an exemption at all is not merely a technical failing.”

RESPONSE:

- This argument is **an argument of semantics**. The Commission can readily understand that the Exemption requests are really seeking **exemption from the tariff filing requirements**, in those cases, where the NVOs opt to do so. And in those cases, the present Petitions have asked the Commission to impose as conditions of granting the Exemption, the confidential service contracts regulations that are imposed on the VOCCs. The Commission can obviously impose other conditions, but the main efficiencies which are being sought are by exempting the NVOs from tariff publishing on a selective basis. And then achieving the sought efficiencies through **confidential** contracting, **whatever they are called or whatever reasonable conditions may be imposed on these**. For example, the Commission might say: “o.k. you are exempt from tariff publication, and when you do this you must keep a copy of the agreement and make it available to the Commission upon request.”

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The true exemption is from the tariff publishing. The conditions of the exemption are on how the NVO and its customer contracts.

4. “The CHRW petition correctly points out that **NVOCCs that are affiliated with VOCCs** are subject to precisely the same regulatory requirements as all other NVOCCs.

“

RESPONSE:

- CHRW believes that one of the developments since OSRA is the proliferation of carrier owned logistics companies (including NVO functions). It is CHRW’s contention that these companies are not situated any different than any other NVO/logistics company. An exemption of the type requested would increase competition, even among these carrier owned companies. The paradigm shift involves offering of a laundry list of services that cannot be offered in a vertically integrated group of companies by related companies. Ex.: Maersk Logistics prominently advertises contracts with 19 major ocean carriers. This is part of the new paradigm. The new **efficiencies, even for carrier owned logistics companies, can be achieved through a contract model, not a tariff model.**

5. WSC states: “The Petitions Do Not Provide Any Guiding Principles for the Commission.”

RESPONSE:

CHRW HAS PROVIDED FOLLOWING GUIDELINES:

1. The Commission has the authority under Section 16 to grant an **exemption to NVOs from tariff publishing requirements, and to** condition this exemption on a confidential contract format.
2. The exemption, if granted, meets the two requirements of Section 16:
 - a) the exemption **will increase competition** among NVOs, and vessel operators, and logistic companies owned by VOCCs; and
 - b) it will **not be detrimental to commerce**; in fact, it will be salutary to commerce.
3. Review should include whether an NVOCC is offering its customers more than just ocean rates and charges; **value-added services** may be provided at various levels in a transportation transaction.
4. For an NVOCC that will be dealing with its customers on a confidential service contract basis, the review must also demonstrate a **history of financial stability**.
5. As part of **this analysis, in judging the impact of servicing long-term debt**, a company must demonstrate ample resources for that

purpose, so that its operations and commitments are not interrupted.

6. Today, the focus has expanded to include **significant investment** in the **information technology systems**, warehousing, and other service areas demanded by shippers. NVOs should be seen as investors in technology and other areas that result in value added services to customer.
7. Obviously, the Commission should not be rewarding NVOCCs who historically have been consistently bad actors in the regulatory process. NVOs should have a **history of compliance** with shipping regulations.

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